ALI JAIS

v.

LINTON ALBERT & ANOR

HIGH COURT SABAH & SARAWAK, BINTULU
HASAN LAH J
[SUIT NO: 22-12-96(BTU)]
14 JUNE 1999

LEGAL PROFESSION: *Duty of care - Failure to file memorandum of appeal within time - Appeal would have otherwise succeeded - Standard of reasonable man practising as an advocate - Whether advocate liable in negligence*

LEGAL PROFESSION: *Retainer - Duties to client - Duty to file memorandum of appeal within time prescribed - Normal contractual relationship - Consequences of breach - Whether solicitor liable in negligence*

The first defendant is an advocate & solicitor of the High Court in Sabah and Sarawak practising under the name and style of M/s Linton & Co, the second defendant. The plaintiff retained the defendants in respect of a dispute in relation to a parcel of land. Dissatisfied with a decision made by the assistant settlement officer under the Sarawak Land Code (Cap 81) ('the Code'), the plaintiff instructed the defendants to lodge an appeal against the decision. The appeal was dismissed on the ground that it did not comply with the conditions set out in s. 102 of the Code, since the decision of the assistant settlement officer had not been published in the Sarawak Government Gazette when the petition of appeal was filed. Subsequently, the plaintiff brought an action against the defendants for damages for negligence and/or breach of contract by the defendants while acting as the plaintiff's advocates and solicitors.

Held:

[1] In failing to file the plaintiff's appeal within three months from the date the decision of the assistant settlement officer was gazetted, there was a breach of duty or lack of reasonable care on the part of the first defendant in handling the appeal. The first defendant had breached the standard of care expected of a reasonable man practising as an advocate and solicitor.

[2] On the evidence adduced, the plaintiff would have succeeded in the appeal had it been heard on its merit. Hence, it was foreseeable that the plaintiff would suffer loss and damage if the appeal was dismissed on the ground that it was not filed within the prescribed time. It was immaterial that the negligence arose during the defendants' conduct of the case as in an action against a solicitor for negligence in litigation, the burden is on the solicitor to show that the client was not damnified as was held in the case of *Miranda v. Khoo Yew Boon.*

[3] A retainer puts into operation the normal terms of a contractual relationship of a solicitor and client. It was the duty of the defendants, after being retained by the plaintiff, to exercise due care, skill, expertise and attention in handling the appeal. By not filing the appeal within the prescribed time, the defendants were clearly in breach of their obligation to give full and proper care and attention to the conduct of the appeal and to protect the plaintiff's interest.

[Action allowed with costs; order accordingly]

Case(s) referred to:

Allen v. Sir Alfred McAlphine & Sons [1968] 1 All ER 543 ***(refd)***
Heywood v. Wellers [1976] 1 QB 446 ***(refd)***
Majid v. Muthusamy [1968] 2 MLJ 89 ***(refd)***
Malaysian Rubber Development Corp Bhd v. Glovve Seal Sdn Bhd [1994] 4 CLJ 783 ***(refd)***
Miranda v. Khoo Yew Boon [1968] 1 MLJ 161 ***(refd)***
Rondel v. Worsley [1967] 3 All ER 993 ***(refd)***
Superintendent of Lands and Surveys (4th Division) v. Hamit Matusin [1994] 3 CLJ 567 ***(refd)***
Tam ak Gayok v. WTK Prasa OK Dollah (Civil Appeal No: K5 of 1979, Miri) ***(refd)***
Yong & Co v. Wee Hood Teck Development Corp [1984] 2 CLJ 285 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 7
Sarawak Land Code (Cap 81), ss. 5, 102, 103
Sarawak Limitation Ordinance (Cap 49), s. 3, Schedule items 71, 93

For the plaintiff - Ranbir Singh; M/s Bong & Co
For the defendants - Stanley Eddy; M/s Battenberg & Talma Advoc

Reported by Farah Naim

JUDGMENT

Hasan Lah J:

Introduction

In this action the plaintiff is claiming for damages to be assessed, special damages in the sum of RM344,800, interest and costs. The claim is grounded on negligence of and/or breach of contract by the defendants while acting as the plaintiff's advocates and solicitors.

Facts

The 1st defendant is an advocate of the High Court in Sabah and Sarawak and at all material times was practising under the name and style of the legal firm of Messrs Linton & Co. Advocates, the 2nd defendant, at Lot 584, 1st Floor, Law Gek Soon Road, Bintulu. The plaintiff is a claimant in respect of all that parcel of land situate at Sungai Keresap, Batang Kemena, Bintulu, containing an area of 6.201 hectares (15.31 acres) more or less described as Lot 272, Block 38 Kemena Land District (hereinafter referred to as the said Lot 272"). On or about 24 July 1991 the defendants were retained by the plaintiff in respect of a dispute relating to the said Lot 272. The inquiry was held by the assistant settlement officer pursuant to the Sarawak Land Code where it was decided on 2 September 1991 that the said Lot 272 was to be divided between the plaintiff and the other 15 claimants comprising his brothers, sisters and cousins. The plaintiff's entitlement was 16/441 share.

The plaintiff then instructed the defendants to lodge an appeal against the said decision. The appeal was than lodged by the defendants on behalf of the plaintiff at the Sessions Court in Bintulu on 3 October 1991 (hereinafter referred to as "the land appeal"). The settlement order containing the decision of the said assistant settlement officer was gazetted on 21 November 1991 in the Sarawak Government Gazette.

At the hearing of the appeal on 22 May 1993 before the Sessions Court counsel for the respondents in the land appeal case raised a preliminary objection that the plaintiff had not complied with the conditions in s. 102 of the Sarawak Land Code and hence, the appeal was incompetent. The Sessions Court delivered its ruling on 26 June 1993 whereby the plaintiff's appeal was dismissed with costs. The Sessions Court held *inter alia* that the Sessions Court had no jurisdiction under the Land Code to hear the land appeal "because it is not, in facts an appeal against or based upon the decision of the settlement officer as envisaged by s. 102 for when petition of appeal was filed the decision had not been published in the Gazette".

On 30 June 1993 the plaintiff paid a retainer fee of RM1,000 to the defendants for appeal to the High Court. The Notice of Appeal was filed on 6 July 1993. On 19 February 1994 the plaintiff paid another sum of RM2,000 to the defendants being payment "in respect of partial payment of appeal to the High Court". The plaintiff did not pursue the appeal to the High Court. Under cross examination by the learned counsel for the defendants the plaintiff stated that he did not pursue the appeal to the High Court because he was not aware of the procedure. On the other hand the 1st defendant stated in his evidence that after the filing of appeal to the High Court the plaintiff gave no further instructions to the defendants nor sign a Warrant to Act as the plaintiff intended to seek a second opinion from the other lawyers on the matter.

The Defence

Essentially the defendants' defence are as follows:

(a) The defendants deny that the land appeal case was dismissed and struck off due to the alleged negligence/breach of contract of the defendants (para. 2 of amended defence);

(b) The 1st defendant had acted with due care and diligence, did in fact file the land appeal after the plaintiff obtained and gave the decision of the assistant settlement officer and resisted the preliminary objection in the Sessions Court (para. 3 of amended defence);

(c) The plaintiff refused to exhaust and failed to give the defendants instructions to proceed on the appeal to the High Court against the decision of the Sessions Court and had not exhausted all avenues (para. 5 of amended defence);

(d) The alleged cause of action did not accrue within three years of the commencement of action and is barred by the Limitation Ordinance (para. 6 of amended defence); and

(e) The defendants deny the losses and damages were caused as alleged in the statement of claim.

The Issues Raised By The Parties And The Findings By Court

(a) The Subject Matter

The first issue raised by the defendants is that the plaintiff has not shown that the said Lot 272 is one and the same parcel of land as stated in exh. P3. Exh. P3 is a letter relating to the transfer of rights in a piece of land owned by the plaintiff's father to the plaintiff which was four acres in area. The plaintiff claimed that this is the same land as the said Lot 272. It is to be noted that the said Lot 272 is 6.201 hectares (15.31 acres) in area but the land in exh. P3 is more or less four acres in area.

It is pertinent at this stage to have a look at the material evidence adduced by the plaintiff relating to the land in dispute. In his evidence the plaintiff stated that his father owned a piece of land known as Lot 272, Block 38, Kemena Land District. He was then appointed as his father's lawful attorney in respect of the said land by a power of attorney which has been tendered as exh. P4 and on 2 June 1979, he purchased the said land from his father at a price of RM1,500. P3 is the document relating to the plaintiff's purchase of the land from his father. The plaintiff stated that he then applied for the land title from the Land and Survey Department, Bintulu.

It is clear from the evidence that when exh. P3 was executed on 2 June 1979 the land referred to therein was not given a title yet and its area was not yet determined by the Land and Survey Department, Bintulu. The earliest evidence relating to its title and area was in the settlement order dated 21 November 1991 (exh. P8).

In paras. 7 and 8 of the amended defence the defendants dispute the losses and damages claimed by the plaintiff in para. 10 of his statement of claim. In effect the defendants are disputing that the loss incurred by the plaintiff on the said Lot 272 amounts to RM306,400 which is equivalent to the value of the said Lot 272 at that time. On that pleading I hold that the defendants are not estopped from challenging that the land referred to in exh. P3 is not the same parcel of land as the said Lot 272.

From the evidence available I hold that the land referred to in exh. P3 and P4 forms part of the said Lot 272. I say so because the area of land mentioned in exh. P3 and P4 is only about four acres whereas the said Lot 272 is 15.31 acres in area. As the difference in the size is too big I do not accept the contention of the learned counsel for the plaintiff that the land mentioned in exh. P3 is the same parcel of land as the said Lot 272. The fact that there were 16 claimants to the said Lot 171 reinforced my conclusion that the land mentioned in exh. P3 forms part of the said Lot 272.

At the same time I do not think that the land mentioned in exh. P3 is not connected to the said Lot 272. This is because the plaintiff had applied for the title to the land mentioned in exh. P3 only and after an inquiry was held by the assistant settlement officer he was named as one of the co-owners of the said Lot 272. That was the only inquiry held in respect of his claim to the land mentioned in exh. P3. In addition the other co-owners of the said Lot 272 are his brothers, sister and cousins. Furthermore the defence has not cross-examined the plaintiff in his evidence on this. In his statement of claim the plaintiff has alleged that he is a claimant in respect of the said Lot 272.

(b) Whether The Plaintiff's Action Is Time-Barred

As an alternative defence the defendants contend that the plaintiff is time-barred under the Sarawak Limitation Ordinance as the alleged cause of action did not accrue within three years of the commencement of this action. It is provided under s. 3 of the Sarawak Limitation Ordinance that every suit instituted after the period of limitation prescribed therefore by the schedule, if limitation has been set up as a defence, shall be dismissed. According to the learned counsel for the defendants the plaintiff was informed of the decision of the Session Court on 28 June 1993 and this is supported by fact that the plaintiff on 30 June 1993 had paid a deposit of RM1,000 for the

Notice of Appeal to the High Court. The learned counsel argued then that the point of time for computation of time should be 28 June 1993 when the plaintiff was informed of the decision of the Session Court. Since the action was commenced only on 25 September 1996 it is well over three years from 28 June 1993. It was contended by the defendants that the plaintiff's action falls under item 71 and item 93 of the schedule to the Limitation Ordinance.

In this connection the learned counsel for the plaintiff submitted that the limitation did not commence on 28 June 1993 for the following reasons:

(i) Even if the defendants have shown that the plaintiff knew on that day that the case was dismissed by the Session Court they did not show that the plaintiff knew of the neglect or misconduct by the defendants which caused such dismissal; and

(ii) The breaches of contract or the negligence in the present case were a continuing one.

Under item 71 of the schedule to the Limitation Ordinance it is provided that time from which the period of limitation begins to run for other suits by principals against agents for neglect or misconduct is when neglect or misconduct becomes known to the plaintiff. Under item 93 it is provided that the period of limitation for claim of compensation for the breach of contract is three years and time begins to run from the time the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, when it ceases.

In his evidence the plaintiff stated that after the decision was given by the Sessions Court in respect of the appeal he went to see the 1st defendant but the 1st defendant asked him to wait for the outcome of the case. When he could not get information from the 1st defendant the plaintiff then went to see PW1, Mr. Lee Khim Boon sometime in June 1995. According to the plaintiff PW1 informed him about the decision of the Sessions Court. In his evidence PW1 stated that the plaintiff came to see him in June 1995 regarding a land matter and PW1 stated that at that time the plaintiff did not know the outcome of the land appeal case in the Sessions Court. After several attempts PW1 managed to obtain the documents relating to the land appeal case. According to PW1 he then informed the plaintiff about the decision of the case sometime in August 1995.

Under cross-examination by the learned counsel for the defendants the plaintiff stated that the 1st defendant informed him about the decision of the Sessions Court on 28 June 1993 and the 1st defendant advised him to appeal against the said decision to the High Court. The plaintiff further stated that on 30 June 1993 he paid a retainer fee of RM1,000 for appeal to the High Court.

The documentary evidence show that the Notice of Appeal (exh. D2) was dated 30 June 1993 and it was filed in court on 6 July 1993 as shown in the praecipe (exh. D1(A)). The official receipts issued by the defendants (exh. P6) show that on 30 June 1993 the plaintiff paid RM1,000 to the defendants and on 19 February 1994 the plaintiff paid another RM2,000 to the defendants for the purpose of the appeal to the High Court.

The 1st defendant stated in his evidence that he informed the plaintiff about the decision of the Sessions Court on 28 June 1993 and he had advised the plaintiff to appeal. The 1st defendant said he filed the Notice of Appeal on 30 June 1993. In February 1994 he received the grounds of decision from the Sessions Court and he then gave a copy of that judgment to the plaintiff.

After considering all the relevant evidences I come to the conclusion that the plaintiff had been informed about the decision in the land appeal case on 28 June 1993. This is because the plaintiff himself agreed under cross-examination that he had been informed about the decision on 28 June 1993. In addition this is reinforced by the undisputed evidence that the plaintiff had paid the retainer fees of RM1,000 on 30 June 1993 to the defendants for the purpose of the appeal to the High Court and the Notice of Appeal itself was dated 30 June 1993.

Notwithstanding my finding that the plaintiff was informed of the decision on 28 June 1993 I am of the view that there is no evidence to show that the plaintiff had been informed of the reasons for the dismissal of the case by the 1st defendant. There is no evidence to show that the 1st defendant had explained the true facts of the land appeal case to the plaintiff who is an old and illiterate simple kampung folk. As such it would appear to be more probable that the plaintiff was not aware of the grounds for the dismissal of the land appeal case. Hence, it can be concluded that he was unable to know the alleged neglect or misconduct by the defendants which caused the dismissal of the case at the material time. Furthermore the 1st defendant has stated in his evidence that he only received the grounds of judgment for the land appeal case in February 1994. In the circumstances I accept the plaintiff's case that the plaintiff was only informed about the reasons for the dismissal of the case by PW1 in August 1995. Therefore for the purpose of limitation the period under item 71 to the Schedule of the Limitation Ordinance started to run from that date. Hence, the plaintiff's claim is not time-barred.

(c) Negligence

The plaintiff's claim is grounded on negligence of and/or breach of contract by the defendants, particulars of which are set out in para. 9 of the statement of claim. The particulars are as follows:

(a) Filing and filed the said appeal at the Sessions Court at Bintulu on the 3 October 1991 when it was not the appropriate time to file such an appeal;

(b) Failure to file an appeal within three months period from the November 1991 when the decision of the Assistant Settlement Officer was gazetted in the Sarawak Government Part V dated 21 November 1991.

(c) Failure to advise the plaintiff to file an appeal within the three months period from 21 November 1991 when the decision of the Assistant Settlement Officer was gazetted in the Sarawak Government Gazette Part V dated 21 November 1991.

(d) Failure to advise the plaintiff not to file the said appeal at the Sessions Court at Bintulu on 3 October 1991 or at any time before 21 November 1991 when it was not the appropriate time to file such an appeal.

(e) Neglecting or failure to give full or proper care and attention to the conduct of the land appeal case.

The defendants do not deny that the 1st defendant did owe a duty of care to the plaintiff on being instructed to handle the matter. However it was submitted by the learned counsel for the defendants that:

(i) The statement of claim does not disclose any cause of action for professional negligence.

(ii) There was no breach of duty or lack of reasonable care on the part of the 1st defendant. The 1st defendant had taken reasonable step to protect the plaintiff's interest and the reason why he filed the appeal early is to avoid the appeal from being time-barred. The 1st defendant had made an honest mistake which did not amount to a negligence.

(iii) The plaintiff has not adduced evidence to show that the 1st defendant has breached the standard of care as expected from a reasonable man practising as an advocate.

(iv) The damage suffered by the plaintiff was not caused by the 1st defendant.

It is pertinent at this stage to remind myself of what was said by Syed Agil Barakbah FJ in *Yong & Co. v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 at p. 45 that:

> The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the

> circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, Third Edition Volume 36 page 96, paragraph 31). He owes a duty not to injure his client by failing to do that which he had under taken to do and which his client has relied on him to do.

As regards the defendants' contention that the pleadings are defective because the statement of claim does not disclose any cause of action for professional negligence it was submitted by the learned counsel for the plaintiff that the plaintiff has pleaded necessary elements of negligence in the statement of claim. In this respect I agree with the learned counsel for the plaintiff that the necessary elements of negligence have been implied in the plaintiff's statement of claim. Under O. 18 r. 7 of RHC it is provided that every pleading must contain only a statement in a summary form of the material facts but not the evidence. In para. 2 of his statement of claim the plaintiff has pleaded that he had retained the defendants to act as his advocate and solicitor in respect of the said Lot 272. In my view it can be implied from this statement that this is a professional engagement and therefore the duties are implied by law. In addition the learned counsel has admitted in his submission that the 1st defendant did owe a duty of care as an advocate for the plaintiff.

As to the element of "breach of duty" this can be implied from the statement in para. 9 of the statement of claim whereby the plaintiff expressly pleaded that the dismissal of the case was due to the negligence and/or breach of contract of the defendants. The particulars of negligence have also been fully set forth in that para. 9.

As to the element of "causation" it can be implied from para. 10 that the damages alleged by the plaintiff therein are due to the dismissal of the land appeal case.

If I am wrong on this, the next question to consider is whether it is too late for the defence to object to the pleadings during the submission stage. In this connection I am reminded of what was decided by the Supreme Court in *Superintendent of Lands and Surveys (4th Division) v. Hamit bin Matusin* [1994] 3 CLJ 567; [1994] 3 MLJ 186 that:

> The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to whom and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise, in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.

In the circumstances I hold that it is too late for the defendant to raise the matter in the final submission and as such that argument must fail.

I now come to the issue of whether there was a breach of duty or lack of reasonable care on the part of the 1st defendant. It was submitted by the learned counsel for the defendant that if the 1st defendant is to be liable in negligence he must have been in breach of the standard of care in accordance with the standard of a reasonable man practising as an advocate. In this respect the learned counsel for the plaintiff submitted that the defendants committed a breach of duty of care by filing the appeal against the decision of the Assistant Settlement Officer to the Sessions Court prematurely and out of the prescribed time. The relevant part of s. 102 of the Sarawak Land Code states that:

> Any person aggrieved by an act or decision of the Settlement Officer ... may, notwithstanding anything to the contrary in Section 7 of the Subordinate Courts Ordinance contained appeal to the Court of a Magistrate of the First Class by a petition in writing made within three (3) months from the date of the publication in the Gazette of the Settlement order containing the decision which is the subject of appeal ...

With respect to the 1st defendant I am of he view that the requirement for filing of an appeal is clear in that provision. The appeal has to be filed within three months from the date of the publication in the Gazette of the settlement order containing the decision which is the subject of appeal. Therefore reasonable advocates and solicitors could not have come to any other conclusion on its interpretation other than the one which was given by the Sessions Court and the learned counsel for the respondents in the land appeal case. The same standard is applicable to the 1st defendant. Furthermore the 1st defendant has also stated in his evidence that he construed s. 102 of the Sarawak Land Code in a way that as long as the appeal was filed inside the period of three months after the publication in the gazette the plaintiff would be protected. During the cross-examination this is what the 1st defendant stated:

> My reading was as long as the appeal was filed within 3 months of the publication of the gazette my client was protected. There was no express provision prohibiting the appeal being filed after the decision of the Settlement Officer but before the publication in the Gazette. My reading is that the time begin to run from the publication in the gazette. I filed the appeal before the publication because I was apprehensive of section 103. I did not want to be caught of being unaware of the publication in the gazette whereby taking the risk of falling a foul of section 103.

Inspite of what was said by the 1st defendant in his evidence the defence contends that the 1st defendant had made an honest mistake in filing the appeal outside the prescribed time. I am unable to agree with the defence that this was a case of an honest mistake. As the 1st defendant knew that the time for appeal under s. 102 of the Sarawak Land Code begins to run from the date of publication of the settlement order in the Gazette, I do not accept that he had made an honest mistake by filing the appeal before the Gazette. He did something which is contrary to his interpretation of the section. Furthermore the defendants alleged in para. 4 of the amended statement of defence that the appeal was filed on the instruction and insistence of the plaintiff despite the advice of the 1st defendant to the appropriate time to file the appeal. This defence is contrary to what was said by the 1st defendant that he made an honest mistake. In the circumstances I reject the claim by the defendants that the 1st defendant had made an honest mistake.

I am also unable to accept the 1st defendant's contention that the provision of s. 102 of the Sarawak Land Code is not very clear and there is no decision from the High Court on the construction of that provision because this is clearly contradicting with what he said in his evidence that he construed the section in a way that as long as the appeal was filed inside the period of three months after the publication in the Gazette the plaintiff would be protected. In addition the 1st defendant had not produced any authority during the hearing of the land appeal in the Session Court to show that the provision of the said s. 102 could be interpreted differently. Furthermore as pointed out by the counsel for the plaintiff the High Court has made a decision on the interpretation of that s. 102 in the case of *Tam ak Gayok v. W.T.K. Prasa bin O.K. Dollah* (Miri Civil Appeal No. K.5 of 1979) on 8 March 1982. In that case Datuk George K.S. Seah J held that under s. 102(1) of the Sarawak Land Code the time limited for appeal was within one month from the date of the publication of the Gazette.

For the reasons given I hold that there was a breach of duty or lack of reasonable care on the part of the 1st defendant in handling the said land appeal to the Sessions Court.

As to the defendants' contention that no evidence was adduced by the plaintiff to show that the 1st defendant has breached the standard of care as expected from a reasonable man practising as an advocate it is clear that a reasonable man practising as an advocate would under the circumstances have filed the appeal within three months from the date the decision of the Assistant Settlement Officer was gazetted. That is the standard of care to be expected from the 1st defendant. Exhibit P2 provides evidence of the yardstick of an ordinary skilled advocate as shown by Mr. Sandhu, the counsel for the

respondents in his conduct of the mater before the Sessions Court. From exh. P2 it can be clearly seen that the 1st defendant provided no authorities to substantiate his interpretation of s. 102 and 103 of the Sarawak Land Code.

As regards the point that the damages suffered by the plaintiff was not caused by the defendants the learned counsel for the defendants argued that it was the decision of the Assistant Settlement Officer which has resulted in damage to the plaintiff and the 1st defendant's task was to attempt to overturn that decision and remedy the damage, if that decision is held to be wrong. The defendants also submitted that the plaintiff had not shown that he was likely to succeed in the appeal before the Sessions Court.

In para. 10 of his statement of claim the plaintiff has set out particulars of losses and damages. There is no doubt the said loss and damages are resulted from the dismissal of the land appeal by the Sessions Court. In this respect the observation made by Diplock LJ (as he then was) in the case of *Allen v. Sir Alfred McAlphine & Sons* [1968] 1 All ER 543 at p. 553 is relevant. It reads:

> ... If the action is dismissed the Plaintiff, in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had it been properly conducted on his behalf by the solicitor.

In order for the plaintiff to succeed the plaintiff must prove that had the appeal not been dismissed on the ground as stated by the learned Session Court judge the plaintiff would have succeeded in his appeal against the decision of the Assistant Settlement Officer. It was submitted by the learned counsel for the plaintiff that the plaintiff would in all probability have succeeded in the appeal before the Sessions Court had the appeal been filed at the appropriate time because the plaintiff had valid documents to support his claim that the said land was sold to him by his father.

In the trial the plaintiff has produced the Power of Attorney (exh. P4) to show that he was appointed as the lawful attorney by his father in respect of the said land in 1976. Exhibit P3 is a documentary evidence to show that on 2 June 1979 the plaintiff's father had sold his rights over the said land to the plaintiff for a consideration of RM1,500. The settlement order in respect of the said Lot 272 gazetted only on 21 November 1991. In his evidence the plaintiff stated that the assistant settlement officer gave his decision on the disputes over the said Lot 171 on 2 September 1991. It is clear then that the plaintiff had been given the rights over the said land before the decision was made by the assistant settlement officer. This means the assistant settlement officer ought to take into consideration exh. P3 and exh. P4 in his decision.

The defendants did not challenge the contents of exh. P3 and exh. P4 and as such they are strong evidence for the plaintiff that he is entitled to an area of about 4 acres from the said Lot 272.

It is my judgment that on the evidence adduced by the plaintiff he would have succeeded in the land appeal case had the appeal been heard on its merit. Hence it was foreseeable that the plaintiffs would suffer loss and damages if the land appeal case is dismissed on the ground that the appeal was not filed within the prescribed time. In the circumstances I hold that the loss and damages suffered by the plaintiff are due to the negligence of the 1st defendants.

It was also submitted by the learned counsel for the defendants that as an advocates and solicitor the defendants are not liable for negligence which arises during their conduct of the case. In support of that the defendants cited the case of *Rondel v. Worsley* [1967] 3 All ER 993 and *Majid v. Muthusamy* [1968] 2 MLJ 89. I am unable to agree with the defendants that that is the law in Malaysia. In this connection I am reminded of what was said by the Federal Court in *Miranda v. Khoo Yew Boon* [1968] 1 MLJ 161 where the Federal Court had considered the case of *Rondel v. Worsley (supra)*. In *Miranda's* case the action for negligence arose out of a civil action in which the respondent retained the appellant as his advocate and solicitor to defend him in that case. The respondent failed in his defence and had instructed the appellant to appeal. The notice of appeal was filed within the prescribed time but the memorandum was not. The Federal Court held that the position of an advocate and solicitor is exactly the same as that of a solicitor in England and if there is an act of negligence it is immaterial to consider whether the act is one normally done in England by a barrister or a solicitor. It was also held that in action against a solicitor for negligence in litigation the burden is on the solicitor to show that the client was not damnified.

In para. 5 of the amended statement of defence the defendants alleged that the plaintiff refused to exhaust and failed to give the defendants instructions to lodge an appeal against the decision of the Sessions Court and has not exhausted avenues open to the plaintiff. In his evidence the 1st defendant stated that he could not pursue the appeal because the plaintiff refused to sign the Warrant To Act as the plaintiff wanted to retain another lawyer for the case. In his cross-examination of the 1st defendant the learned counsel for the plaintiff suggested to the 1st defendant that it was the 1st defendant who abandoned the appeal as he knew that it would be a futile effort to appeal. In this respect the plaintiff has stated in his evidence that the 1st defendant did not advise him to appeal against the decision of the Sessions Court. However when he was cross-examined by the learned counsel for the

defendants the plaintiff agreed with the suggestions made by the said counsel that the 1st defendant had advised him to appeal to the High Court and on 30 June 1993 he paid a retainer fee of RM1,000 for the appeal to the High Court. The plaintiff also agreed with the suggestion that he refused to sign the Warrant To Act for the 1st defendant to proceed with the appeal.

In reference to this it was submitted by the learned counsel for the plaintiff that on the balance of probabilities the defendants had never requested the plaintiff to sign a Warrant To Act.

In this respect I am inclined to agree with the submission of the learned counsel for the plaintiff that on the balance of probabilities the defendants had never requested the plaintiff to sign a Warrant To Act. The defendants have not produced any documentary proof to show that they had requested the plaintiff to sign the said warrant. The defendants have not produced any letter showing that they have requested the plaintiff to sign the Warrant To Act. The defendants have not even produced the said unsigned warrant if there was one. There was also no letter from the defendants to the plaintiff to say that they have withdrawn themselves from representing the plaintiff in the appeal to the High Court. More importantly the fact that the plaintiff continued to pay the fees to the defendants in respect of the appeal to the High Court until 19 February 1994 where another sum of RM2,000 was paid shows that the defendants were retained by the plaintiff as late as that date. Notwithstanding that the plaintiff had not signed a Warrant To Act I hold that the payment of the retainer fees by the plaintiff to the defendants and the fact that there was no letter from the defendants informing the plaintiff that they have withdrawn themselves from representing the plaintiff have given rise to the existence of retainer by implication (see *Yong & Co. v. Wee Hood Teck Development Corporation (supra)*).

In case I am wrong on this point I am also of the view that this issue is not really relevant to this case. This is because the appeal, even if it was pursued with by the plaintiff and the defendants, would not have changed the plaintiff's case as it is very unlikely that the High Court will overturn the decision of the Session Court judge in respect of the interpretation of s. 102 of the Sarawak Land Code.

(d) Breach Of Contract

The learned counsel for the defendants submitted that the plaintiff had not pleaded the terms of contract between the plaintiff and the defendants and it was also not pleaded as to which term of the contract that had been breached by the defendant. The learned counsel contended that the matter as to the breach of contract in the present case does not arise. In this respect the learned

counsel for the plaintiff submitted that the retainer of the defendants by the plaintiff in respect of the land appeal to the Sessions Court gave rise to a contractual relationship and as such, an action based on contract may be brought by the plaintiff against the defendants for breach of duty.

It is settled law that a retainer of the defendants by the plaintiff would put into operation the normal terms of the contractual relationship of solicitor and client. In *Yong & Co. v. Wee Hood Teck Development Corporation (supra)* Syed Agil Barakbah FJ had this to say at p. 43:

> We agree with the learned judge that there was therefore a retainer which put into operation the normal terms of contractual relationship including in particular the duty of the Appellants as solicitors to protect the interests of the Respondents as their clients in matters to which the retainer relates by all proper means *(Groom v. Cooker).*

It was the duty of the defendants after being retained by the plaintiff to exercise due care, skills, expertise and attention in the handling of the land appeal case in the Sessions Court. It was the defendants' duty to file the appeal to the Sessions Court within the prescribed time and by not filing the said appeal within the prescribed time the defendants were clearly in breach of his obligation to give a full and proper care and attention to the conduct of the said land appeal and to protect the plaintiff's interest. The appeal in the land appeal case has become useless. As such I hold that the defendants are also liable in contract for negligence.

(e) Damages

The plaintiff is claiming both the general and special damages. The particulars of special damages have been set out in para. 10 of the statement of claim.

In respect of the general damages it was submitted by the learned counsel for the defendants that the plaintiff is deemed to have abandoned his claim on general damages as he has not adduced evidence on the general damages. In respect of the claim for special damages the learned counsel submitted that there is no evidence as to the value of the said Lot 272 on the date the settlement order was made *ie*, 2 September 1991. Any value or amount of compensation after that date amounts to economic loss and is not recoverable. It was also contended by the learned counsel that the defendant has to account for the amount of compensation given to him in respect of his 16/441 shares in the said Lot 272 from the total amount of compensation awarded to the owners of the said Lot 272 as stated in the Gazette Notification No. 2809 dated 28 October 1993 for the extinguishment of their rights over the said Lot 272 (exh. P7).

In respect of the claim for the refund of legal fees of RM9,000 and taxed costs of RM4,200 the learned counsel for the defendants contended that the claims are without basis because the fee of RM9,0000 was for work done by the defendants as advocates for the plaintiff and as regards the RM4,200 it has not been proven that the amount has been paid out by the plaintiff.

As regards the claim for general damages it was argued by the learned counsel for the plaintiff that the court is entitled to award a sum for the breach of contract and negligence of the defendants. In support of that he cited the case of *Heywood v. Wellers* [1976] 1 QB 446. It is to be observed that in that case the Court of Appeal awarded the damages for the molestation and the mental distress and upset suffered by the appellant. Therefore that decision is not applicable to the present case because in the present case the plaintiff is not claiming for damages for physical and mental injuries. As the plaintiff has not proved his damages I agree with the defendants that the claim for general damages must fail.

As regards the claim for the loss of the said Lot 272 the learned counsel for the plaintiff submitted that the quantum is to be assessed as at the date of the breach which is on 21 September 1993 whereby the plaintiff's right over the said Lot 272 had been extinguished under s. 5 of the Sarawak Land Code. On that date the amount of compensation awarded for the said Lot 272 was RM306,400.

I am unable to agree with the learned counsel for the plaintiff that the breach occurred on 21 September 1993. It is my view that the breach of the contract and the negligence happened on 3 October 1991 that is when the 1st defendant lodged the Petition of Appeal in the Sessions Court. This is the basis of the plaintiff's claim. As such the value of the said Lot 272 should be determined as at that date. In *Malaysian Rubber Development Corporation Bhd. v. Glove Seal Sdn. Bhd* [1984] 4 783; [1994] 3 MLJ 569 the Supreme Court held *inter alia* that generally the value of the goods should be determined at the time of breach. The plaintiff has not adduced evidence on the value of the said Lot 272 as on 3 October 1991. However he has adduced evidence on the value of the said land on 21 September 1993 as stated in the Gazette Notification No. 2809 dated 28 October 1993 (exh. P7). The value was RM306,400. As stated in the settlement order (exh. P8) the said Lot 272 was a Native Customary land and it was a Country Land used for agricultural purposes. It was owned by 16 co-owners. I do not think there was a big jump in the price of the Native Customary Land used for agricultural purposes in Kemena Land District from 1991 to 1993. As such I am of the view that the value of the said Lot 272 in 1993 can be used for the purpose of assessing damages in 1991. Therefore, taking the value of the said Lot 272 at RM306,400 in 1991

I will now proceed to determine the loss incurred by the plaintiff. As I have decided earlier the plaintiff had a right only over four acres of the said Lot 272 his loss would therefore be only RM80,052.25 (4 x 306,400).

According to exh. P7 RM306,400 was paid out by the government to the owners of the said Lot 272 as compensation. The plaintiff is therefore, deemed to have receive his compensation which is proportionate to his share over the said Lot 272 *ie*, RM11,116.55 (16/441 x 306,400). Therefore his actual loss for the land is RM68,935.70.

As regards the claim for the refund of legal fees of RM9,000 I agree with the learned counsel for the plaintiff that the defendants should refund the amount to the plaintiff because the defendants were negligent. The plaintiff is entitled to recover the money he paid to the defendant as legal fees as it was paid on a consideration which had wholly failed. (See *Heywood v. Wellers (supra)*).

As regards the claim for taxed costs payable to the respondents in the land appeal case for an amount of RM4,200 the plaintiff has not adduced evidence to show that he has paid out the amount and as such he has not proved that he had incurred the loss. This claim is therefore rejected. I also reject the plaintiff's claim for an amount of RM25,000 as the plaintiff has not proved his loss in respect of the amount claimed.

Conclusion

The plaintiff has proved his case against the defendants. The defendants are therefore liable to the plaintiff for the losses and damages suffered by the plaintiff due to the negligence and the breach of contract on the defendants' part. The plaintiff is awarded special damages in the sum of RM77,935.70. However the plaintiff's claim for general damages is dismissed as the plaintiff has not proved his loss. The defendants are also ordered to pay the interest on the special damages awarded at 8% per annum from the date of the filing of this suit *ie*, 25 September 1996 until the date of the judgment and thereafter interest at 8% per annum also until full settlement of the amount. Finally the defendants are ordered to pay the costs of this action to the plaintiff.